

Excerpts from “Mediation Seminar: Settlement Conference Training”, created and compiled by Chris Purnell of the Neighborhood Christian Legal Clinic, Indianapolis.

1) Options Other Than Foreclosure

- a. Number of homes lost to foreclosure up 45% this April from April 2009 (Realtytrac)
- b. 12% of U.S. homes in foreclosure (Realtytrac)
- c. However, overall foreclosures down 2%, first decrease in 5 years (Realtytrac)
- d. Lenders cannot handle any more homes in their REO inventories—but old habits die hard

2) What Does The Homeowner Need?

- a. Ask these questions:
 - i. What does the homeowner think he/she needs?
 - ii. What does the homeowner really need?
 - iii. Should the homeowner keep this house?
 - iv. What can the homeowner realistically hope to attain?
- b. To know the options available to the borrower you must ask:
 - i. What type of loan is it?
 - 1. FHA/VA, Conventional, FNMA, FHLMC
 - ii. How far behind is the homeowner?
 - iii. Does the homeowner have any funds to put towards the arrearage?
 - iv. Was the hardship permanent or temporary?
 - 1. If permanent, can the homeowner afford any type of reasonable payment?
 - v. No reasonable payment and permanent hardship: Disposition options must be examined
 - 1. If disposition: Is the house on the market? If so then ask for time to sell. Then try for possible short sale.
 - 2. If no time for sale or impractical: Is a deed-in-lieu of foreclosure possible? If not, is an in rem judgment possible?
 - vi. If foreclosure is the only “remedy” then the homeowner needs to consider bankruptcy
 - 1. If this is the case: You need to refer him/her to an attorney who specializes in bankruptcy

THE OPTIONS:

- 1. Reinstatement
- 2. Repayment Plan
- 3. Forbearance
- 4. Special Forbearance
- 5. Partial Claim

6. Modification
7. HAMP
8. Sale
9. Short Sale
10. Deed-in-Lieu of Foreclosure
11. In Rem Judgment

Retention of house vs. disposition of house – what does the borrower want? What can the borrower afford?

Retention Options:

- 1) Reinstatement (Short-Term Hardship)
 - a. Homeowner pays all delinquent payments and past due amounts
 - b. Brings the mortgage current
 - c. Extraordinary, but may be feasible
- 2) Repayment Plan (Short-Term Hardship)
 - a. Homeowner cures default by making regular payments as due PLUS partial payments on the arrearage
- 3) Repayment Plan (Long-Term Hardship)
 - a. Reduced or suspended payments
 - b. Curable short term hardships
- 4) Special Forbearance (Short-Term Hardship)
 - a. FHA loans only
 - i. Type I
 1. Minimum 4 month plan
 2. Meant for homeowners with a hardship guaranteed to end soon
 - ii. Type II
 1. Combines a forbearance with another FHA loss mitigation program (Loan Modification, Partial Claim)
- 5) Partial Claim (Short-Term Hardship)
 - a. FHA loans only
 - i. HUD grants a junior mortgage in an amount up to 12 months of missed payments
 - ii. Brings the mortgage current
 - iii. Late fees and foreclosure costs are not covered
 - b. Eligibility Criteria:
 - i. Must have an FHA loan
 - ii. 4 to 12 months behind

- iii. Not qualify for forbearance or modification
- iv. Must be able to resume regular payments
- v. CANNOT be combined with a modification

6) Loan Modification (Long-Term Hardship)

- a. Many shapes and sizes
- b. Lender can modify loan terms:
 - i. Reduce interest rate
 - ii. Extend the loan payment period
 - iii. Reamoritization with capitalization of arrears
 - 1. Missed payments added to existing balance and then the loan is reamoritized for the new amount
- c. Eligibility Criteria:
 - i. Hardship is chronic
 - ii. Complies with investor/FHA guidelines

7) HAMP (Long-Term Hardship)

- a. Home Affordable Modification Program
- b. Part of the larger “Making Home Affordable” plan
- c. Stated goal: Bring homeowner’s payment down to 31% of their gross monthly income
- d. Eligibility Criteria:
 - i. House is primary residence
 - ii. Must owe less than \$729,750
 - iii. Hardship
 - iv. Mortgage originated prior to January 1, 2009
 - v. Payment (PITI) must be greater than 31% of homeowner’s gross monthly income

Disposition Options:

1) Sale

- a. Homeowner puts house on the market
- b. Attempt is to sell at market value
- c. Most traditional method for “getting out from under” a house one can no longer afford

2) Short Sale

- a. Homeowner and lender agree to sell the house
- b. Proceeds are accepted as total satisfaction of the mortgage debt
- c. Essentially, the lender takes less than the loan value and calls it even
- d. Less adverse to credit
- e. Hard to navigate – must use a realtor who understands short sales

- 3) Deed In Lieu of Foreclosure
 - a. Homeowner voluntarily conveys clear title to the lender for discharge of the debt
 - b. A little better than foreclosure, in credit terms
 - c. Deals with deficiency problem
- 4) In Rem Judgment
 - a. Foreclosure judgments have two consequences:
 - i. The home is lost (collateral)
 - ii. Homeowner is responsible for difference between amount received at sheriff sale and loan value (personal obligation)
 - b. An in rem judgment attempts to take part of the sting of foreclosure judgment – no personal obligation for balance of loan
- 5) Foreclosure and Bankruptcy
 - a. Bankruptcy combats personal obligation
 - b. Lender can reposes collateral (house) but cannot get other assets to pay off deficiency
 - c. Is this called for?
 - d. Many lenders forgive deficiencies
 - e. Be sure deficiency is forgiven
 - f. Refer to bankruptcy attorney

Summary:

- What the client NEEDS is paramount!
- Keep everything you have learned in mind
- Must be a holistic choice
- The choice must be based on all the facts

High-Level Checklist of “Red Flags” in Mortgage Foreclosure

4 Basic Steps:

- ☐ **STOP** (Know the client’s circumstances)
- ☐ **LOOK** (Find necessary documents)
- ☐ **LISTEN** (“Hear” the docs, client)
- ☐ **ACT** (Refer to attorney? Mitigate? Both?)

1) Stop – What is the borrower’s story?

- a. How many months behind is borrower?
 - i. 3 months is usually construed as “default” warranting filing for foreclosure
- b. What caused the delinquency?

- c. Has lender complied with all laws?
 - i. Must serve the defendant with foreclosure documents in some way
- d. Would a settlement conference help this borrower?

2) Look – What documents do I need to “sleuth through”?

- a. Necessary documents (minimally):
 - i. Note
 - ii. Mortgage
 - iii. HUD 1 Settlement Statement
 - iv. Truth In Lending Act Disclosure
- b. Also, look for:
 - i. Notice of Right to Cancel (non-purchase money loans)
 - ii. Loan application
- c. Methods of finding this information:
 - i. Ask the borrower—highly unlikely
 - ii. Title company—but might be out of business
 - iii. Qualified Written Request—Real Estate Settlement Procedures Act (RESPA, 12 U.S.C. §2605(e))
 - 1. Requires loan servicer to respond to specific requests for information about their servicing of loan
 - iv. Ask for missing documents (Note, Mortgage, etc.) and information regarding escrow accounts, payment application, payment history
 - 1. Servicer must acknowledge receipt within 20 days
 - 2. Servicer must send requested documents/answers within 60 days
 - v. AND/OR, refer to attorney, who can use discovery devices

3) Listen – What do the documents and the clients say about the transaction and the servicing of the loan?

- a. Combine the documents (TILA, HUD 1, Note, Mortgage, Loan Application) to see if there might be some “Red Flags”
- b. Some Options:
 - i. TILA violations
 - ii. Indiana statutory violations
 - iii. Unfair and Deceptive Acts and Practices (UDAP)
- c. HUD 1 Settlement Statement (12 U.S.C. §§2601 to 2617)
 - i. Required by the Real Estate Settlement Procedures Act (RESPA) to be given to borrower
 - ii. Shows where the money goes (borrower, lender, third party)
 - iii. Essential to doing the loan math for TILA, HOEPA violations
 - iv. What to look for:
 - 1. “YSP POC”= Yield Spread Premium, Paid Outside of Closing

- a. This is an amount of money (sometimes as high as \$4000-5000) given to broker if borrower is put in worse loan than borrower qualified for
 - 2. Miscellaneous charges
 - 3. Forced Charges (where lender forced borrower to use particular appraiser, etc.—listen to client)
- d. Truth in Lending Act (TILA) Disclosure (15 U.S.C. §§1601 to 1666(j))
 - i. TILA's Main Provisions
 - 1. Correct disclosures of material loan provisions, which are
 - a. APR
 - b. Finance Charge
 - c. Amount Financed
 - d. Total of Payments
 - e. Payment Schedule
 - 2. 2 copies of Three-Day Notice of Right to Cancel
 - 3. Statutory Tolerances for rescission right
 - ii. Errors in Finance Charge can be as high as .5% (15 U.S.C. §1605(f)(2))
 - 1. BUT tolerances are \$35 if foreclosure filed (15 U.S.C. §1635(i)(1))
 - iii. Right of Rescission destroys the security interest
 - 1. This will require some basic math to navigate
 - a. Must figure:
 - i. What the Finance Charges are per the lender (will need HUD 1 and Note to compare APR and Finance charges)
 - ii. What the Finance Charges are according to your calculations (see HUD 1 again)
 - iii. See whether the two match up
- e. The Promissory Note
 - i. Secures personal liability of the borrower
 - ii. Has many essential terms (what loan rate is, whether it adjusts, some more “exotic” terms)
 - iii. Will also need this for the math (compare APR on TILA with APR on Note, then see whether Finance Charges are correct)
- f. Mortgage/Deed of Trust
 - i. This creates the security interest
 - ii. Shows rights and responsibilities
 - iii. Defines:
 - 1. DEFAULT
 - 2. PAYMENT APPLICATION
 - 3. BORROWER'S RIGHTS

4) Act – To Litigate or Mitigate, That is the Question

- a. Really a false dichotomy; you can do both.
- b. Sometimes, litigation can act as incentive for lenders/servicers to engage in loss mitigation (especially useful for obstreperous servicers)
- c. Documents for loss mitigation
 - i. Will need (at minimum):
 - ii. 2 years tax returns,
 - iii. 2 months pay stubs,
 - iv. 2 months bank statements,
 - v. 2 months statements on all accounts,
 - vi. Hardship letter, and
 - vii. Letter of Authorization (gives you ability to talk to lender about client's loan)
- d. Loss mitigation options:
 - i. Basic options (Review):
 1. Repayment Plan and Forbearance
 2. Loan Modification and HAMP/MHA
 3. Straight Sale or Short Sale
 4. Deed In Lieu of Foreclosure
 5. In Rem Judgment

5) Dealing with Borrower/s:

- a. Listen to the entire story (Pre-settlement, Closing ceremony, Servicing, and the Foreclosure process)
- b. Guide them with questions
- c. Ask for:
 - i. Tax returns used on their loan application
 - ii. Loan Application itself
 - iii. Pay Stubs for that year
- d. Any other documents?
 - i. Servicer is required to send/provide documents to borrower, for example:
 - ii. Transfer of servicing notice at least 15 days before the transfer goes into effect (new servicer must do likewise)
 - iii. Annual Escrow Account Statement
 - iv. Escrow Analysis (upon request)
 1. Must comply with Qualified Written Request provisions
- e. Legal Theories?
 - i. TILA Violations
 - ii. If any of the material disclosures are missing, misstated beyond the tolerances, can trigger the right to rescission
 - iii. Also, must give borrower the 2 copies of Notice of Right to Cancel (non-purchase money loans)
 - iv. UDAP (Unfair Deceptive Acts and Practices)

1. Indiana's UDAP is codified at Ind. Code 24-5-0.5-1 to 24-5-0.5-12
 2. Known as the Indiana Home Loan Practices Act
 3. Somewhat difficult to fit transactions into
- v. RESPA
1. 12 U.S.C. 2601-2617; meant for dealing with servicing of loan
 2. Several requirements codified there
- vi. Fraud
1. Remember the elements:
 - a. An intentional misrepresentation that is made with the intent to induce reliance on the part of the borrower and it does induce justifiable reliance leading to damages
- vii. Breach of Contract
1. Use this with servicing abuses (look to note, mortgage for rights, responsibilities)
- viii. Negligence
1. Need Duty, Breach, Harm, Causation

Summary: Red Flags for Attorney Review:

- Final HUD 1 Settlement Statement contains conflicting or inaccurate information, does not match the Good Faith Estimate
- Kickbacks to mortgage broker or other party in exchange for transaction
- Steering by broker to high rate lender; borrower could have/should have qualified for better rate or product
- Terms at closing are different than those promised or disclosed to borrower prior to closing
- Application for loan contains inaccurate, false, or fraudulent information
- Borrower was mentally incompetent, elderly, sickly, obviously did not speak or read English; not just unsophisticated
- No net tangible benefit from the refinance of the home
- Loan exceeded 100% LTV at time of financing
- Especially "unorthodox" loan closing (i.e. on the trunk of someone's car at a Taco Bell)
- Option ARMs
- Payments not correctly applied according to terms of mortgage